Petition

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81-346

NO. _____

IN THE
Supreme Court of the United States

OCTOBER TERM 1981

SEATTLE CRESCENT CONTAINER SERVICE,
Petitioner,

v.

PORT OF SEATTLE,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF WASHINGTON

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QUESTION PRESENTED FOR REVIEW

Whether Section 905 of the Longshoremen's and Harbor Workers' Compensation Act, as amended, voids an express contract of indemnity between a stevedore and a non-vessel third party.

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STATE OF WASHINGTON

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Seattle Crescent Container Service (hereinafter "Seattle Crescent") a joint venture, by its attorneys, respectfully prays that a writ of certiorari issue to review the decision of the Court of Appeals of the State of Washington, Division I, filed on March 2, 1981.

OPINIONS BELOW

The Order Granting Seattle Crescent Container Service's Motion of Summary Judgment and Judgment of Dismissal of the Superior Court of the State of Washington for King County dated February 16, 1979 is printed at pages A-1 to A-6, infra, and is not officially reported. The Order Dismissing Certain Claims of the Superior Court of the State of Washington for King County dated October 10, 1979 is printed at pages B-1 to B-3, infra, and is not officially reported. The opinion of the Court of Appeals of the State of Washington, Division I, reversing the summary judgment of the King County Superior Court was filed March 2, 1981, is printed at pages C-1 to C-17, infra, and is reported at 28 Wash. App. 508, 624 P.2d 1168 (1981). The Order Denying Motion for Reconsideration of the Court of Appeals of the State of

Washington, Division I, dated March 24, 1981 is printed at page D-1, infra, and is reported at 624 P.2d 1168 (1981). The Order of the Supreme Court of the State of Washington dated May 22, 1981 denying Petition for Review is printed at pages E-1 to E-2, infra, and is reported at 95 Wash. 2d 1022 (1981).

JURISDICTION

The date of the opinion of the Court of Appeals of the State of Washington sought to be reviewed is March 2, 1981 which is also the date of its filing. A Motion for Reconsideration of that decision was denied by the Court of Appeals of the State of Washington by an order dated March 24, 1981. A Petition for Review of the court of appeals' decision was denied by an order of the Supreme Court of the State of

Washington dated May 22, 1981. Jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3).

STATUTE INVOLVED

Longshoremen's and Harbor Workers' Compensation Act, as amended, Title 33 United States Code, Section 905 which states:

> (a) The liability of an employer prescribed in Section 904 of this title shall be exclusive and in place of all other liability of such employer to the employee, his legal representative, husband or wife, parents, dependents, next of kin, and anyone otherwise entitled to recover damages from such employer at law or in admiralty on account of such injury or death, except that if an employer fails to secure payment of compensation as required by this chapter, an injured employee, or his legal representative in case death results from the injury, may elect to claim compensation under the chapter, or to maintain an action at law or in admiralty for damages on account of such injury or death. In such action the dependant may not plead as a defense that the injury was caused by the negligence of a fellow servant, or that the employee assumed the risk of his employment,

or that the injury was due to the contributory negligence of the employee.

(b) In the event of injury to a person covered under this chapter caused by the negligence of a vessel, then such person, or anyone otherwise entitled to recover damages by reason thereof, may bring an action against such vessel as a third party in accordance with the provisions of Section 933 of this title, and the employer shall not be liable to the vessel for such damages directly or indirectly and any agreements or warranties to the contrary shall be void. If such person was employed by the vessel to provide stevedoring services, no such action shall be permitted if the injury was caused by the negligence of persons engaged in providing stevedoring services to the vessel. If such person was employed by the vessel to provide ship building or repair services, no such action shall be permitted if the injury was caused by the negligence of persons engaged in providing ship building or repair services to the vessel. The liability of the vessel under this subsection shall not be based upon the warranty or seaworthiness or a breach thereof at the time the injury occurred. The remedy provided in this subsection shall be exclusive of all other remedies against the vessel except remedies available under this chapter.

STATEMENT OF THE CASE

Clarence Gibson (not a party to the appeals in the state courts) filed a negligence and breach of warranty action against the Port of Seattle (hereinafter "Port") for injuries he sustained while working on a straddle carrier provided by the Port. The Port filed a third-party complaint against Gibson's employer, Seattle Crescent Container Service, alleging a right to indemnity under a written contract between Seattle Crescent and the Port. Seattle Crescent filed an answer, several counterclaims, and a fourth-party complaint against Clarklift of Washington, Inc. and later filed a motion for summary judgment against the Port. The trial court granted Seattle Crescent's summary judgment motion and held that the indemnity provision of the contract was voided by Section 905 of the Federal Longshoremen's and

Harbor Workers' Compensation, Act 33 U.S.C. § 901 et seq. (hereinafter "LHWCA").

After prevailing on its motion for summary judgment, Seattle Crescent entered a voluntary nonsuit on its counterclaims and fourth party complaint. The trial court subsequently denied the Port's motions for reconsideration and for leave to amend its third-party complaint.

The plaintiff's claim was ultimately settled short of trial and in the court's Order Dismissing Certain Claims (set out at pages B-1 to B-3, infra) all claims, counterclaims and cross-claims were dismissed with prejudice except the Port's third-party claim against Seattle Crescent. The Port then appealed from the judgment of dismissal of its third-party claim against Seattle Crescent to the Court of Appeals of the State of Washington. That court reversed the trial court and held that Section 905 of the LHWCA does not void an

express contract of indemnity between a stevedore and a non-vessel third party. Seattle Crescent moved for reconsideration of the court of appeals' decision but this motion was denied on March 24, 1981. Seattle Crescent then petitioned the Supreme Court of the State of Washington for review of the court of appeals' decision but this petition was denied on May 22, 1981.

ARGUMENT

The decison of the Court of Appeals of the State of Washington should be reviewed by this Court to resolve all doubt as to the validity of express contracts of indemnity between stevedores and non-vessel third parties. The Supreme Court is the final arbiter of the meaning of the LHWCA and as such is the only Court which can remove all such doubt. So long as doubt exists as to the validity of contracts of

indemnity such as the one at issue here, no stevedore employer can adequately assess the potential liability exposure it may have arising out of lawsuits against non-vessel third parties brought by longshoremen injured while in the stevedore's employ. Nor can insurers of such stevedore employers intelligently underwrite the risks presented by insurance on such employers unless and until this Court decides whether contracts of indemnity such as this one are valid. Further, until this issue is finally put to rest non-vessel third parties with superior bargaining power (such as the Port of Seattle) can continue to force stevedores to enter into indemnity contracts which purport to immunize these third parties from the consequences of their own negligent conduct and this immunity is precisely what Congress in the 1972 Amendments declared to be

against public policy even when accomplished by means of an express contract.

As originally enacted in 1927 the LHWCA contained an exclusive remedy provision virtually identical to what now appears as Section 905(a) of the amended version. Because compensatory benefits to injured employees were seriously deficient under the original act[1] and longshoremen incurred high risks in the course of their employment[2] this Court formulated a new basis of recovery for them. First, the

---

[1] Under the original Act, the amount of wages recovered was subject to a fixed and arbitrary maximum. In 1972, the maximum had been fixed for 12 years at $70 a week for a totally disabled worker. As a result, many totally disabled workers received only 30% of their average weekly wage. S. REP. NO. 92-1125, 92d Cong., 2d Sess. 5 (1972).

[2] The injury frequency rate for longshoring was well over four times the average for manufacturing operations. S. REP. supra, at 2.

Court extended the doctrine of unseaworthiness of a vessel to longshoremen doing the traditional work of seamen. Seas Shipping Co. v. Sieracki, 328 U.S. 25, 66 S. Ct. 861, 98 L. Ed. 1062 (1946). This, however, created an inequity between vessel owners and longshoremen employers because the vessel owner could be forced to pay damages to an injured longshoreman when the condition injuring the longshoreman was created by the stevedore. Accordingly, in Ryan Stevedoring Co., Inc. v. Pan Atlantic Steamship Corp., 350 U.S. 124, 76 S. Ct. 232, 100 L. Ed. 133 (1956) the Court declared that a contract between a ship owner and a stevedore created an implied warranty of workmanlike service running from the employer to the ship owner which was breached by an employer's negligence which resulted in injury to the longshoreman. This breach of warranty thus enabled a vessel to obtain indemnity from an

injured longshoreman's employer even though other Supreme Court decisions precluded contribution by a jointly negligent employer. Halcyon Lines v. Haenn Ship Ceiling & Refitting Corp., 342 U.S. 282, 72 S. Ct. 277, 96 L. Ed. 318 (1952).

Even with the increased rights afforded longshoremen by the Ryan case, these benefits were dependent on litigation and the result was a flood of third party suits creating inordinate social costs often without the real benefit the longshoremen hoped for. As stated in the Senate Report on the 1972 Amendments to the LHWCA:

> The social costs of these lawsuits, and the delays, crowding of court calendars and the need to pay for lawyers' services has seldom resulted in a real increase in actual benefit for the injured workers.

S. REP. N[illegible] 92-1125, 92d Cong., 2d Sess. 4 (1972). Substantial resources which could be utilized directly for the benefit of

injured longshoremen were needlessly being expended by employers to defer litigation costs and indemnity liability. See H. REP. (Education and Labor Comm.), NO. 92-1441, 92d Cong., 2d Sess. (1972), reprinted in [1972] U.S. CODE CONG. & AD. NEWS 4698. Thus Congress undertook the task of substantially revising the LHWCA.

The issue before this Court is one only this Court can definitively decide: i.e., what is the real effect of the 1972 Amendments to the LHWCA on this Court's decision in Ryan Stevedoring Co. v. Pan Atlantic Steamship Corp., supra. This is an especially important issue because the 1972 Amendments substantially expanded the shoreward jurisdiction of the LHWCA[3] so that many of the injuries covered by the

---

[3] 33 U.S.C. §§ 902(3), 902(4) and 903.

Act do not occur on vessels but rather involve longshoremen, their stevedore employers and non-vessel third parties. Yet the Port of Seattle and the Court of Appeals of the State of Washington concluded that the 1972 Amendments only prohibited indemnity agreements between a stevedore employer and a vessel. Gibson v. Port of Seattle, 21 Wash. App. 508, 513, 624 P.2d 1168, 1171 (1981). The principal case in support of this view is Zapico v. Bucyrus-Erie Co., 579 F.2d 714 (2d Cir. 1978). Seattle Crescent urges that the Port, the Washington Court of Appeals and Judge Friendly of the Second Circuit are all incorrect. There is considerable support for an alternative and broader view of the effect of the 1972 Amendments on the Ryan decision with respect to non-vessel third parties. The California Court of Appeals in IT Corporation v. Superior Court of the State of California, 83 Cal.

App. 3d 443, 147 Cal. Rptr. 828 (1978) acknowledged that there has been a difference of approach in the case law interpreting the effect of the 1972 Amendments to Section 905 in this context:

> The case law has taken two separate paths in construing the scope of the immunity from liability in indemnity.
>
> One line of cases focuses on the legislative purpose of the 1972 Amendment to avoid "the old circuity of action" so as to reduce transactional costs and thereby to create an economic base that permits greater compensation to be paid the injured worker pursuant to the LHWCA. (See e.g., Spadola v. Viking Yacht Co., (S.D.N.Y. 1977), 1978 A.M.C. 253, 256-57, 441 F. Supp. 798, 801). Applying that approach, a consignor of freight, whose employee was injured in the course of shoreside activity related to loading of a ship, was held protected by subdivision (b) of Section 905 from an action for indemnity brought by a stevedore sued by the employee although the consignor of freight was not a "vessel" within the literal definition of that term in the Longshoremen's and Harbor Workers' Compensation Act (33 U.S. Code § 902, subd. (21). (Spadola v. Viking Yacht Co., 1978 A.M.C. 253, 441 F. Supp. 798.) The broad rule of immunity from

indemnity extending it to persons in a similar position to that of the "vessel" where indemnity would permit the circuity of action against which the 1972 amendment is directed has been applied by a federal court in California. S.S. Seatrain Louisiana, Etc. v. Cal. Stevedore, 1977 A.M.C. 1427, 424 F. Supp. 180. It is adopted by the one California decision that we have discovered dealing with the subject. Standard Fruit & Steamship Co. v. Metropolitan Stevedore Co., 1976 A.M.C. 196, 52 Cal. App. 3d 305, 125 Cal. Rptr. 111 (1975).

Other federal cases focus on the definition of "vessel" to strictly limit the application of subdivision (b) of Section 905 irrespective of the circuity of litigation that may result (See e.g., Gould v. General Mills, Inc., (W.D.N.Y. 1976) 411 F. Supp. 1181; Zapico v. Bucyrus-Erie Co., (S.D.N.Y. 1977), 1977 A.M.C. 2068, 434 F. Supp. 567; Cargill v. U.S.A., (E.D. Va. 1976), 1977 A.M.C. 50). Those cases rely upon the Ryan implied warranty and construe the warranty as unrelated to the doctrine of liability for unseaworthiness eliminated by the 1972 amendment in the case of longshoremen and others covered by the LHWCA.

Forced to choose between the conflicting lines of decisional law, we accept that which applies the legislative purpose of the 1972 amendment to create a broad immunity from indemnity to the employer of the person subject to the LHWCA

> who sues another for his personal injuries. Those cases seem the better reasoned.

1980 A.M.C. at 2312-2313. (Emphasis added.)

Other federal courts have likewise aopted a broader reading of the effect of the 1972 Amendments on the Ryan decision. The court in Kane v. Firestone Steel Products Co., 463 F. Supp. 473 (E.D. Pa. 1978) stated:

> In support of its motion to dismiss, pursuant to Fed. R. Civ. P. 12(b)(6), Northern argues that Section 904 of the Act provides for compensation to be paid by an employer to an employee longshoreman in the event of injury and that Section 905 of the Act provides that such compensation shall be lieu of all other liability on account of such injury to the employee. In response, Firestone argues that Section 905(a) serves only to limit third party claims by vessels against an employer and not claims by shippers, manufacturers or other non-vessel third parties against a plaintiff's employer. In support of this, Firestone believes that Section 905(a) must be read in conjunction with Section 905(b), which states that an injured party may "bring an action against such

vessel . . . and the employer shall not be liable to the vessel for such damages directly or indirectly . . . . ." 33 U.S.C. § 905(b). Firestone urges that, in view of the specificity with which Congress sought to bar claims by vessels against employers, it certainly would have been equally specific if it had intended to bar such claims by non-vessel parties.

We cannot agree with Firestone's interpretation of Section 905(b). Subsection 905(b) was added to the Act in 1972, P.L. 92-576 (1972), and it is clear from the legislative history of the 1972 Amendments that Section 905(b) was added to the Act not to alter the substantive effect of the existing provisions, but rather to deal with the liability being imposed upon employers of dock workers based the unseaworthiness and warranty theories as enunciated by the Supreme Court in Seas Shipping Co. v. Sieracki, 328 U.S. 85, 66 S. Ct. 872, 90 L. Ed. 1099 (1946), and Ryan Stevedoring Co. v. Pan Atlantic S.S. Corp., 350 U.S. 124, 76v S. Ct. 232, 100 L. Ed. 133 (1956) respectively. 1972 U.S. Code Cong. & Admin. News pp. 4698, 4701, "Elimination of Unseaworthiness Remedy." Furthermore, this Court has held on several occasions that Section 905(a) was intended to relieve employers of third party liability to vessels as well as to non-vessels. For example, in Blackburn v. Eaton Corp., Civil Action No. 76-2148 (E.D. Pa., March 31, 1977), it was held that the defendant forklift manufacturer could not

bring a third party claim against the plaintiff's employer because, on its face, the plain language of Section 905(a) barred any such claims of indemnity, the employer's sole liability being that of compensation under the statute. Similarly, in Kridlow v. American Export Lines, Civil Action Nos. 74-2442 and 75-2958 (E.D. Pa., April 13, 1977), focusing on the phrase "directly or indirectly" in Section 905(a), Judge Joseph L. McGlynn, Jr., on similar reasoning held that Section 905(a) barred a third party claim by a supplier of packing crates. See also, Myers v. J. A. McCarthy, 428 F. Supp. 656 (E.D. Pa. 1977) (Section 905(a) barred a third party claim by a separate stevedoring firm). We agree with these decisions and with the manner in which the court in Fitzgerald v. Compania Naviera La Molinera, 394 F. Supp. 402 (E.D. Pa. 1974), expressed its reasoning when it stated:

> As now traced out, the pattern of the LHWCA is that the burden of employee injury must rest on the employer, but its liability is restricted to compensation; the burden of injuries caused by the fault of a third party rests on the third party without recourse to risk shifting . . .

Id., at 411. Accordingly, in respect to the grounds asserted by the parties above, we hold that Firestone is barred by Section 905(a) from asserting a claim for indemnity and/or contribution

> against Northern. See, Louviere v. Shell Oil Co., 509 F.2d (5th Cir. 1975).

463 F. Supp. at 474-475. (Footnotes omitted.)

Despite the disparity of views of courts which have examined the issue, Seattle Crescent believes the Senate Report leaves little doubt but what Congress thought is was outlawing all indemnity agreements when it passed the 1972 Amendments to the LHWCA. The Senate Report expressly states:

> Employer groups indicated their willingness to increase [compensation] payments but indicated they could do so only if the Longshoremen's and Harbor Workers' Compensation Act were to again become the exclusive remedy against the stevedore as had been intended since its passage in 1927 until modified by various Supreme Court decisions.
>
> The bill reported by the committee meets these objectives by specifically eliminating suits against vessels brought for injuries to longshoremen under the doctrine of seaworthiness and outlawing indemnification actions and "hold harmless" or indemnity agreements. It continues to allow suits against

> vessels or other third parties for negligence at the same time it raises benefits to a level commensurate with present day salaries and with the needs of injured workers whose sole support will be payments under the Act.

S. REP. supra at 5. (Emphasis added.)

When this Court determined that longshoremen were being treated inequitably because of the compensation scheme presently in existence in the United States it responded with its decision in Seas Shipping Co. v. Sieracki, supra. When this Court determined that ship owners were being unfairly burdened with the cost of lawsuits occasioned in large part by the negligence of stevedores it responded with its decision in Ryan v. Pan Atlantic Steamship Co., supra. Congress responded to the flurry of three-party litigation occasioned by the Sieracki and Ryan decisions by adopting the 1972 Amendments to the LHWCA. The entire thrust of those amendments was to eliminate this three-party litigation

and to see to it that the money expended by employers on account of personal injuries to employees went primarily to injured workers and was not funneled off into attorneys' fees and other costs.

Seattle Crescent submits that this Court is now faced with yet another inequity which is being spawned by a varied reading of the effect of the 1972 Amendments to the LHWCA on the Ryan case in cases involving non-vessel third parties. This Court is the only Court which can definitively put an end to the flood of three-party litigation which will inevitably result if indemnity agreements between stevedores and non-vessel third parties are allowed to be enforced. Public policy demands that a stevedore be protected from indemnity clauses with non-vessel third parties to the same extent that it is protected from such clauses in contracts with vessels. Otherwise, the

very purpose of the 1972 Amendments will be thwarted.

Even if this Court were to agree with Judge Friendly and hold that Section 905 of the LHWCA does not bar contracts of indemnity between stevedores and non-vessel third parties, it is of the utmost importance that this Court accept this question for review and decide the issue once and for all. Otherwise, doubt will remain as to the effect of the 1972 Amendments on such contracts of indemnity. If Judge Friendly is right, then Congress ought to address an obvious disparity and inequity in the law. If, on the other hand, Seattle Crescent is correct in its interpretation of the effect of the 1972 Amendments this Court ought to make that clear so that the parties involved in the waterfront community can go about their business with a clearer understanding of the liability

exposure they may have as a result of injuries to their workers.

CONCLUSION

There now exists a conflict between the decisions of various courts in the United States with reference to their interpretation of the effect of the 1972 Amendments to the LHWCA on this Court's decision in Ryan v. Pan Atlantic Steamship Corp., supra. Several courts, including the Court of Appeals for the Second Circuit, conclude that the amendments to Section 905 of the LHWCA do not bar written contracts of indemnity between a stevedore and a non-vessel third party. Other courts, including the United States District Court for the Eastern District of Pennsylvania, take a much broader view of the effect of the amendments to Section 905. The legislative history supports the

approach taken by the U.S. District Court for the Eastern District of Pennsylvania. Regardless of which approach is the correct one, this Court should grant certiorari to resolve the conflict between the various courts of this country and to enable various parties involved in waterfront activities to adequately assess and insure against the liability exposure presented by injuries to their employees whether these injuries occur on vessels or on shore.

Respectfully submitted,

MARK EDWIN JOHNSON
LANE POWELL MOSS & MILLER
Counsel fo_ Petitioner,
Seattle Crescent Container Service

APPENDIX A

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR KING COUNTY

CLARENCE GIBSON, Plaintiff, v. PORT OF SEATTLE, a municipal corporation, Defendant and Third Party Plaintiff, and CLARKLIFT OF WASHINGTON, INC., a Washington corporation, Defendant, Fourth Party Defendant and Fifth Party Plaintiff, and CLARK EQUIPMENT CO., a foreign corporation, Defendant and Fifth Party Defendant, v. SEATTLE CRESCENT CONTAINER SERVICE, Third Party Defendant and Fourth Party Plaintiff.	NO. 839135 ORDER GRANTING SEATTLE CRESCENT CONTAINER SERVICE'S MOTION FOR SUMMARY JUDGMENT AND JUDGMENT OF DISMISSAL

THIS MATTER having come on for hearing at 9:30 a.m. on January 22, 1979 before the Honorable Robert M. Elston, on the motion of third party defendant and fourth party plaintiff Seattle Crescent Container Service (hereinafter "Seattle Crescent") and the court having considered all of the files and records herein including, without limitation, the Brief in Support of Seattle Crescent Container Service's Motion for Summary Judgment on the Port of Seattle's Third Party Claim for Indemnity, Affidavit of George Cruickshank in Support of Seattle Crescent Container Service's Motion for Summary Judgment, and the Port of Seattle's Memorandum of Authorities Opposing Third Party Defendant's Motion for Summary Judgment, and the court having heard and considered oral argument by counsel for Seattle Crescent, Mark E. Johnson of Lane, Powell, Moss & Miller,

and by counsel for the Port of Seattle, Stephanie J. Grogan of Reed, McClure, Moceri & Thonn, P.S., and the court being fully advised in the premises, and having concluded as a matter of law: (1) that to the extent the indemnity clause in the contract between Seattle Crescent Container Service and the Port of Seattle referred to in Paragraph IV of the Port's Third Party Complaint purports to require Seattle Crescent to indemnify the Port of Seattle from and against any and all damages sustained by persons in the employ of Seattle Crescent who are covered by the provisions of the Longshoremen's and Harbor Workers' Compensation Act, as amended, such indemnity clause is voided by, and such indemnity is expressly prohibited by the exclusive remedy provision of the Act, 33 U.S.C. § 905; and (2) that even if said indemnity clause were not voided by 33

U.S.C. § 905, the contract between the Port of Seattle and Seattle Crescent does not entitle the Port of Seattle to the relief claimed in its Third Party Complaint under the terms of said indemnity clause because said clause expressly excludes Seattle Crescent Container Service's obligation to indemnify and defend the Port for accidents or occurrences caused solely by negligent or intentional acts of the Port and the Port has not alleged that Seattle Crescent Container Service either independently or concurrently caused the injuries to the plaintiff/employee of Seattle Crescent and any comparative negligence of the plaintiff/employee of Seattle Crescent alleged by the Port of Seattle is not imputable to Seattle Crescent for the purposes of the aforesaid indemnity clause; and that therefore the Port of Seattle has stated no claim against Seattle Crescent upon which relief can be granted, and that there is no

genuine issue as to any material fact and Seattle Crescent is entitled to judgment as a matter of law, it is hereby

ORDERED, ADJUDGED and DECREED, that Seattle Crescent Container Service's Motion for Summary Judgment on the Port of Seattle's Third Party Claim for Indemnity be, and the same hereby is granted and the Port of Seattle's Third Party Complaint against Seattle Crescent Container Service be, and the same hereby is dismissed with prejudice and with taxable costs to third party defendant and fourth party plaintiff Seattle Crescent Container Service.

DONE IN OPEN COURT this 16th day of February, 1979.

s/
Robert M. Elston, Judge

Presented by:

LANE, POWELL, MOSS & MILLER

By s/
Mark E. Johnson
Of Attorneys for Third Party Defendant and Fourth Party Plaintiff Seattle Crescent Container Service

Copy Received, Notice of
Presentation Waived and
Approved for Entry:

REED, McCLURE, MOCERI & THONN, P.S.

By s/_____
Stephanie J. Grogan
Of Attorneys for Third Party
Plaintiff Port of Seattle

LEVINSON, FRIEDMAN, VHUGEN, DUGGAN,
BLAND & HOROWITZ, P.S.

By s/_____
Robert D. Duggan
Of Attorneys for Plaintiff
Clarence Gibson

KARR, TUTTLE, KOCH, CAMPBELL,
MAWER & MORROW

By s/_____
Steven V. Lundgren
Of Attorneys for Defendant,
Fourth Party Defendant and
Fifth Party Plaintiff
Clarklift of Washington,
Inc.

WILLIAMS, LANZA, KASTNER & GIBBS

By s/_____
Paul C. Gibbs
Of Attorneys for Defendant and
Fifth Party Defendant Clark
Equipment Co.

APPENDIX B

SUPERIOR COURT OF WASHINGTON COUNTY OF KING

CLARENCE GIBSON, Plaintiff, v. PORT OF SEATTLE, et al., Defendants.	NO. 839135 ORDER DISMISSING CERTAIN CLAIMS

PURSUANT to the Stipulation of the parties it is hereby:

1) ORDERED that all claims, counter-claims, and cross claims arising from the accident of March 18, 1977, which is the subject of this lawsuit, shall be and hereby are dismissed with prejudice and without costs except the Port of Seattle's third party claim against Seattle Crescent Container Service.

2) The Court having previously granted the Motion for Summary Judgment by Seattle Crescent Container Service and having dismissed the Port of Seattle's third party claim against Seattle Crescent Container Service by Order dated February

16, 1979 (and having denied Reconsideration of said decision on April 17, 1979), said Order shall be and hereby is declared to be the final order of the Court.

3) All claims herein have now been dismissed by stipulation or by Order of the Court.

4) Pursuant to stipulation of the parties, nothing herein shall be deemed to affect those causes of action pending in King County Cause No. 833821.

DONE IN OPEN COURT this 10th day of October, 1979.

s/ Robert M. Elston
Judge

Presented by:
REED, McCLURE, MOCERI & THONN, P.S.

By s/
J. E. THONN, Of Attorneys for
the Port of Seattle

Approved as to form,
Notice of Presentation waived:

LEVINSON, FRIEDMAN, VHUGEN, DUGGAN,
BLAND & HOROWITZ, P.S.

By s/
Robert D. Duggan, of Attorneys
for Plaintiff Clarence Gibson

KARR, TUTTLE, KOCH, CAMPBELL,
MAWER & MORROW

By s/_____
Steven V. Lundgren, of Attorneys
for Defendant Clarklift of
Washington

WILLIAMS, LANZA, KASTNER & GIBBS

By s/_____
Paul C. Gibbs, of Attorneys for
Defendant Clark Equipment Co.

APPENDIX C

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON

CLARENCE GIBSON, Defendant, and PORT OF SEATTLE, a municipal corporation, Appellant, v. SEATTLE/CRESCENT CONTAINER SERVICES, a joint venture, Respondent, and CLARKLIFT OF WASHINGTON INC., a Washington corporation, Defendant, and CLARK EQUIPMENT CO., a foreign corporation, Defendant.	)	No. 8096-2-1 DIVISION ONE FILED MAR 2, 1981

RINGOLD, J.--Clarence Gibson (not a party to this appeal) filed a negligence and breach of warranty action against the Port of Seattle (Port) for injuries he sustained while working on a straddle carrier provided by the Port. The Port filed a third party complaint against Gibson's employer, Seattle-Crescent Container Services (Crescent), alleging a

right to indemnity under a contract between Crescent and the Port. Crescent filed an answer, several counterclaims, a fourth party complaint against Clarklift of Washington, Inc. and a motion for summary judgment against the Port. The trial court granted Crescent's summary judgment motion and gave two reasons for its decision. First, the indemnity provision was voided by section 905 of the federal Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. §§ 901 et. seq (Act). Second, the Port's third party complaint stated no grounds upon which relief could be granted because it did not allege that Crescent's conduct caused the injury.

After prevailing on its motion for summary judgment, Crescent entered a voluntary nonsuit on its counterclaims and fourth party complaint. The trial court subsequently denied the Port's motions to reconsider and for leave to amend. Shortly

after entering a final order dismissing the Port's third party complaint, the trial court signed an order confirming the settlement of Gibson's complaint against the Port for $45,000 plus $20,000 attorney's fees and costs. The Port appeals the dismissal of its third party complaint and raises two issues:

1. Does section 905 of the Longshoremen's and Harbor Workers' Compensation Act bar the Port's contractual indemnity action?

2. Does the Port's third party complaint fail to state a claim upon which relief can be granted?

We hold that the Act does not bar the Port's action and that the complaint states a claim upon which relief can be granted, and we therefore reverse.

INDEMNITY AGREEMENTS UNDER THE ACT

Title 33 U.S.C. § 905 was most recently amended in 1972 by designating

the existing provision as subsection (a) and adding subsection (b). Longshoremen's and Harbor Workers' Compensation Act, Pub. L. No. 92-576, § 18(a), 86 Stat. 1263 (1972). Section 905 reads:

> (a) The liability of an employer prescribed in section 904 of this title shall be exclusive and in place of all other liability of such employer to the employee, his legal representative, husband or wife, parents, dependents, next of kin, and anyone otherwise entitled to recover damages from such employer at law or in admiralty on account of such injury or death, except that if an employer fails to secure payment of compensation as required by this chapter, an injured employee, or his legal representative in case death results from the injury, may elect to claim compensation under the chapter, or to maintain an action at law or in admiralty for damages on account of such injury or death. In such action, the defendant may not plead as a defense that the injury was caused by the negligence of a fellow servant, or that the employee assumed the risk of his employment, or that the injury was due to the contributory negligence of the employee.
>
> (b) In the event of injury to a person covered under this chapter caused by the negligence of a vessel, then such person, or anyone

> otherwise entitled to recover damages by reason thereof, may bring an action against such vessel as a third party in accordance with the provisions of section 933[1] of this title, and the employer shall not be liable to the vessel for such damages directly or indirectly and any agreements or warranties to the contrary shall be void. If such person was employed by the vessel to provide stevedoring services, no such action shall be permitted if the injury was caused by the negligence of persons engaged in providing stevedoring services to the vessel. If such person was employed by the vessel to provide ship building or repair services, no such action shall be permitted if the injury was caused by the negligence of persons engaged in providing ship building or repair services to the vessel. The liability of the vessel under this subsection shall not be based upon the warranty of seaworthiness or a breach thereof at the time the injury occurred. The remedy provided in this subsection shall be exclusive of all other remedies against the vessel except remedies available under this chapter.

(Italics ours.)

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[1]This section allows an employee to file an action for damages against any third party responsible for his or her injuries without losing the right to compensation from the employer. 33 U.S.C. § 933.

Section 905(a) limits an employer's liability on account of an employee's injury or death to the liability prescribed in the Act. Prior to the 1972 amendments, the Supreme Court held that this exclusive liability provision did not bar an indemnity action against an employer by a third party that was liable for the employee's injuries. Ryan Stevedoring Co. v. Pan-Atlantic Steamship Corp., 350 U.S. 124, 100 L. Ed. 133, 76 S. Ct. 232 (1956). Typically, a vessel strictly liable on a seaworthiness theory could obtain indemnity from the employer under express or implied contracts or under a tort theory of transferring the loss to the actively negligent party. See Zapico v. Bucyrus-Erie Co., 579 F.2d 714 (2d Cir. 1978). Under the circumstances of this case, an express contractual provision, the courts have held that the indemnity liability is not "on account of" an employee's injury. It is

the result of an independent contractual obligation. Ryan Stevedoring Co. v. Pan-Atlantic Steamship Corp., supra; Zapico v. Bucyrus-Erie Co., supra. By enacting 33 U.S.C. § 905(b), Congress rejected the application of this analysis to "vessels" and barred "vessels" from seeking indemnity from employers. Congress did not address the issue of indemnity for non-vessels.

The entire Act was extensively amended in 1972, and the purpose of the amendments is well documented. First, Congress intended to substantially increase the benefits available to an injured worker. Second, Congress intended to enable the worker to pursue remedies against both the employer under the Act and against a negligent vessel, but because benefits were substantially increased under the amendment, Congress eliminated the absolute liability of a vessel under the doctrine of seaworthiness. Congress required the

worker to prove negligence by the vessel in order to recover damages. Third, because the vessel would be liable only as a result of its own wrongful conduct, Congress saw no reason to continue to allow the vessel to recover its losses from the employer on an indemnity theory. The addition of subsection (b) was intended to void any indemnification agreement between the employer and the vessel. H.R. Rep. No. 92-1441, 92d Cong., 2d Sess. 2-8, 22, reprinted in (1972) U.S. Code Cong. & Ad. News 4700-4705, 4719.

The Port is not a "vessel" as defined in the Act, 33 U.S.C. § 902(21), and Crescent concedes that section 905(b) does not bar indemnity relief for the Port. Crescent argues, however, that the amendments in 1972 reveal a Congressional intent to apply the exclusive liability protection in section 905(a) more broadly and bar indemnity relief for non-vessels. Crescent

contends: (1) Congress intended to give the language of section 905(a) its plain meaning and intended to overrule the strained reading in the Ryan opinion; (2) this intent is evident in Congress' concern with the social cost of collateral third party litigation and the desire to increase workers' compensation without diverting employers' resources to pay the costs of litigating indemnity claims; (3) a reasonable reading of section 905(a), particularly in light of Contress' intent, is that this contractual indemnity action arises on account of an employee's injury and, therefore, is barred; and (4) Judge Friendly's decision in Zapico is incorrect in several respects and is not controlling in this jurisdiction. See Edmonds v. Compagnie Generale Transatlantique, 443 U.S. 256, 61 L. Ed. 2d 521, 99 S. Ct. 2753 (1979), Director, Workers' Compensation Programs v. Rasmussen, 440 U.S. 29, 59 L.

Ed. 2d 122, 99 S. Ct. 903 (1979), Northeast Marine Terminal Co. v. Caputo, 432 U.S. 249, 53 L. Ed. 2d 320, 97 S. Ct. 2348 (1977).

Were the congressional intent as Crescent argues, section 905(b) directed solely to "vessels" would have been unnecessary. Congress could have simply declared its intent to protect employers from indemnity in all instances. While some courts have found a congressional intent to reduce the wasteful litigation caused by non-vessels seeking indemnity, they have gone no further than to deny indemnity sought on a tort or implied contract theory. Oman v. Johns-Manville Corp., 482 F. Supp. 1060 (E.D. Va. 1980); Spadola v. Viking Yacht Co., 441 F. Supp. 798 (S.D.N.Y. 1977). Nothing in these or any other decision brought to our attention undermines the rule that the employer is free to contract to indemnify non-vessel

third parties for damages they pay to an employee of the indemnitor. We find the opinion of Judge Friendly in Zapico to be a thorough historical analysis of the act and the effect of the 1972 amendments. The court there held that Ryan retains its viability and that "the statute explicitly cuts off indemnity only to a 'vessel.'" Zapico at 721. The opinion fully considered and rejected several public policy arguments that indemnity agreements with non-vessels should also be voided.

In 1972, Congress extended the Act's coverage inland from the shoreline and created a greater likelihood of indemnity actions by non-vessels. 33 U.S.C. § 903. Congress, however, chose to attack the primary problem presented to it in the testimony received prior to the 1972 amendments. That problem was third party litigation by vessels. As mentioned in the House Report, Congress expects to see

further progress in reducing employee injuries and is ready to reexamine the whole third party suit question if it appears that the 1972 amendments have not been productive. H.R. Rep. No. 92-1441, 92d Cong., 2d Sess. 8, reprinted in [1972] U.S. Code Cong. & Ad. News 4705. It is for Congress to examine whether third party actions by non-vessels create the same or similar problems as such actions by vessels and to decide whether agreements to indemnify non-vessels should be declared void.

We conclude that the direct contractual relationship between Crescent and the Port is fully enforceable as to indemnity. Nothing in the language of the 1972 amendments nor the legislative history warrants the conclusion that the rule in Ryan was overruled with respect to express contracts with non-vessel third parties. While cases have disagreed on the continued vitality of various forms of implied

indemnity for non-vessels, there is no authority to support Crescent's contention that it should not be bound by its express, contractual agreement to indemnify the Port. Crescent's public policy arguments, though persuasive, do not alter the language of section 905 or the Ryan rule for non-vessels. Those public policy arguments must be presented to Congress, not the courts.

SUFFICIENCY OF THE THIRD PARTY COMPLAINT

In its third party complaint, the Port alleged that its right to indemnity from Crescent arose from the following contractual language:

> The Contractor [Crescent] shall be responsible for and shall indemnify, defend and hold harmless the Port from all liabilities or expenses of defense of claims or suits for loss of or damage to property of third persons and for bodily injury or death of any person, including employees of the Contractor, . . . arising out of the performance of the services by the Contractor as specified in this Contract; provided, however, that the Port shall

not be entitled to such indemnity, defense or holding harmless, when the accident or occurrence is caused solely by negligent or intentional acts of the Port, or failure of the Port to perform its obligations under Article 7[2] of this Contract.

---

[2]Article 7 reads: "Information and equipment furnished by Port of Seattle:

"A. Port of Seattle shall give Contractor all necessary information and instructions, including notice relating to condition of containers which requires special handling, as far in advance as possible so that Contractor may schedule efficiently the services set forth in Articles 4 and 5.

"B. Port of Seattle shall provide adequate lights for night work and necessary materials for securing containers and other cargo.

"C. Port of Seattle will provide container moving and handling equipment for Contractor's use in handling Port of Seattle containers; Contractor shall not use such equipment or vessel equipment if it is apparent that it is not in good order. All such equipment shall meet the standards of Item 205, Seattle Container Tariff No. 1."

The complaint alleged that Gibson's injuries were not caused solely by the Port's negligent or intentional acts or by the Port's failure to perform contractual obligations. Further allegations stated that Gibson was Crescent's employee and that he was injured in the course of performing his duties for Crescent. The allegations also stated that Gibson's negligence was the sole cause of his injuries.

Crescent contends that the indemnity agreement must be construed strictly against the Port and because there is no express allegation that Crescent caused or concurred in causing the accident, the Port cannot pursue its action.

The Port's third party complaint states sufficient facts to give notice of a claim upon which relief could be granted. Under the contract, a cause of action existed if the Port's actions were not

solely responsible for the injuries of the employee. The Port made an allegation in these terms. Even if the Port were required to allege Crescent's responsibility, it was sufficient to allege that Gibson was performing his duties as Crescent's employee when injured by his negligent acts. Crescent's negligence did not have to be expressly alleged where, as here, the allegations were sufficient to make its negligence readily conceivable. Berge v. Gorton, 88 Wn.2d 756, 567 P.2d 187 (1977). As held in Berge, no claim should be dismissed unless it appears, beyond doubt, that the plaintiff cannot prove any facts in support of its claim that would entitle it to relief.

The Port asks us to direct a judgment in its favor in light of the settlement with Gibson and a jury verdict in the Port's favor in a separate action against

Crescent for damage to the straddle carrier. The trial court should have the first opportunity to rule on this and any other issues that may arise.

We, therefore, reverse and remand to the trial court for further proceedings consistent herewith.

s/Ringold, C.J.

WE CONCUR:

s/Corbett, J.

s/Anderson, J.

APPENDIX D

IN THE COURT OF APPEALS OF
THE STATE OF WASHINGTON

CLARENCE GIBSON, Plaintiff, v. PORT OF SEATTLE, a municipal corporation, Appellant, v. SEATTLE CRESCENT CONTAINER SERVICE, a joint venture, Respondent, CLARKLIFT OF WASHING- TON, Inc., a Washing- ton corporation, Defendant, and CLARK EQUIPMENT CO., a foreign corp., Defendant.	NO. 8096-2-I ORDER DENYING MOTION FOR RECONSIDERATION

The respondent, Seattle Crescent Container Service, having filed its motion for reconsideration herein and the court having determined that it should be denied; therefore it is hereby

ORDERED that the motion for reconsideration be, and the same hereby is, denied.

DATED this 24th day of March, 1981.

s/Solie M. Ringold
Acting Chief Judge

APPENDIX E

THE SUPREME COURT
STATE OF WASHINGTON
OLYMPIA
98504

May 22, 1981

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Counsel:

Re: Supreme Court No. 47729-9- Gibson v.

Port of Seattle, et al.

Court of Appeals No. 8096-2-I

Following consideration of the above entitled Petition for Review on May 22, 1981, the following notation order was entered on page 77, Volume 2, of the Petition for Review Docket:

"DENIED"

s/
Honorable James M. Dolliver
Acting Chief Justice

Very truly yours,

s/
JOHN J. CHAMPAGNE
Clerk

Opposition

Office - Supreme Court, U.S.
FILED
SEP 18 1981
ALEXANDER L. STEVAS
CLERK

NO. 81-346

IN THE

Supreme Court of the United States

OCTOBER TERM 1981

SEATTLE CRESCENT CONTAINER SERVICE,
Petitioner,

v.

PORT OF SEATTLE,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF WASHINGTON

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1981

SEATTLE CRESCENT CONTAINER SERVICE,
Petitioner,

v.

PORT OF SEATTLE,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATEMENT OF THE CASE

Petitioner's statement of the case did not set forth the provisions of the contract of indemnity entered into by the Port of Seattle and Seattle/Crescent:

> The contractor [i.e., Seattle/Crescent] shall be responsible for and shall indemnify, defend and hold harmless the Port from all liabilities or expenses of defense of claims or suits for loss or damage to property of third persons and for bodily injury or death of any person, including employees of [Seattle/Crescent] . . . arising out

> of the performance of the services by [Seattle/Crescent] as specified in this contract; provided, however, that the Port shall not be entitled to such indemnity, defense or holding harmless when the accident or occurrence is caused solely by negligent or intentional acts of the Port, or failure of the Port to perform its obligations under Article 7 of this contract.
>
> . . . .
>
> Article 7
>
> . . . .
>
> C. The Port of Seattle will provide container moving and handling equipment for contractors' use in handling Port of Seattle containers; [Seattle/Crescent] shall not use such equipment or vessel equipment if it is apparent that it is not in good order. All such equipment shall meet the standards of Item 205, Seattle Container Tariff No. 1.

Petitioner's statement did not mention that in a separate action brought by the Port against Seattle/Crescent for damage to the straddle carrier operated by Gibson, the jury determined that Seattle/Crescent was negligent and solely responsible for the accident.

OVERVIEW OF CASE

This case involves the interpretation of a federal statute as it relates to a written contract of indemnity. Specifically, this case involves the United States Congress' 1972 amendments to the Longshoremen and Harbor Worker's Act.

The interpretation adopted by the Washington State Court of Appeals in this case is the one set forth by Judge Friendly of the Second Circuit in reviewing these same amendments: Zapico v. Bucyrus-Erie Co., 579 F.2d 714 (2d Cir. 1978). It is consistent with every single case which has considered the 1972 amendments.

ARGUMENT OF COUNSEL

I. Since No "Final Judgment" Has Been Rendered Herein This Court Does Not Have Jurisdiction to Hear This Matter

Seattle/Crescent alleges jurisdiction on 28 U.S.C. § 1257(3). In pertinent part it provides:

> Final judgments or decrees rendered by the highest court of a state in which a decision could be had, may be reviewed by the supreme court as follows:
>
> . . . .
>
> (3) By writ of certiorari, . . . where any title, right, privilege or immunity is specially set up or claimed under the . . . statutes of . . . the United States.

We find a discussion of the statute in Pope v. Atlantic Coastlines R.R., 345 U.S. 379, 381 (1952):

> The statute which vests us with jurisdiction to review the decisions of state courts provides that the judgment must come from the "highest court of a state in which a decision could be had," and must be "final." 28 U.S.C. § 1257. The case at bar clearly met the first requirement, but we were in doubt as to whether it satisfied the second.
>
> Congress has limited our power to review judgments from state courts lest the court's jurisdiction be exercised in piecemeal proceedings to render advisory opinions. Were our reviewing power not limited to "final" judgments, litigants would be free to come here and seek a decision on federal questions which, after later proceedings, might subsequently provide to be unnecessary and irrelevant to a complete disposition of the litigation. Ordinarily, then, the overruling of

> a demurrer, like the issuance of a temporary injunction, is not a "final" judgment.

We may also note Arnold v. United States of America, for the use of W.B. Guimarin & Co., 263 U.S. 427, 434 (1923):

> It is well settled that a case may not be brought here by writ of error or appeal in fragments; that to be reviewable a judgment or decree must be not only final, but complete; that is, final not only as to all the parties, but as to the whole subject matter and as to all the causes of action involved; and that if the judgment or decree be not thus final and complete, the writ of error or appeal must be dismissed for want of jurisdiction.

The decision which Seattle/Crescent wishes to have this Court review, is not a final decision. It is a decision of the Washington Court of Appeals in which the court reversed and remanded to the trial court. The Port had specifically asked the Court of Appeals to direct the entry of a judgment, but the Court of Appeals would not do so:

> The Port asks us to direct a judgment in its favor in light of the settlement with Gibson and a jury verdict in the Port's favor in a separate action against Crescent for damage to the straddle carrier. The trial court should have the first opportunity to rule on this and any other issues that may arise.
>
> We, therefore, reverse and remand to the trial court for further proceedings consistent herewith.

As is evident, the "final judgment" called for by 28 U.S.C. § 1257 has not yet occurred.

II. The 1972 Amendments to the Longshoremen and Harbor Workers Compensation Act Do Not Affect a Written Contract of Indemnity Between a Stevedore and a Non-Vessel

The essence of the written indemnity contract between the Port and Seattle/Crescent is:

> [Seattle/Crescent] . . . shall indemnify, defend, and hold harmless the Port from all liabilities or expenses of defense of . . . suits for . . . bodily injury . . . of any person, including employees of [Seattle/Crescent] . . . arising out of performance of the services by [Seattle/Crescent] as specified in this contract. . . .

33 U.S.C. § 905(a) and (b), as amended in 1972, provide:

> (a) The liability of an employer prescribed in Section 904 of this Title shall be exclusive and in place of all ~~other liability of such~~ employer to the employee, his legal representative, husband or wife, parents, dependents, next of kin, and anyone otherwise entitled to recover damages from such employer at law or in admiralty on account of such injury or death, except that if an employer fails to secure payment of compensation as required by this chapter, an injured employee, or his legal representative in case death results from the injury, may elect to claim compensation under the chapter, or to maintain an action at law or in admiralty for damages on account of such injury or death. In such action the dependant may not plead as a defense that the injury was caused by the negligence of a fellow servant, or that the employee assumed the risk of his employment, or that the injury was due to the contributory negligence of the employee.
>
> (b) In the event of injury to a person covered under this chapter caused by the negligence of a vessel, then such person, or anyone otherwise entitled to recover damages by reason thereof, may bring an action against such vessel as a third party in accordance with the provisions of Section 933 of this Title, and the employer shall not be

> liable to the vessel for such damages directly or indirectly and any agreements or warranties to the contrary shall be void. If such person was employed by the vessel to provide stevedoring services, no such action shall be permitted if the injury was caused by the negligence of persons engaged in providing stevedoring services to the vessel. If such person was employed by the vessel to provide ship building or repair services, no such action shall be permitted if the injury was caused by the negligence of persons engaged in providing ship building or repair services to the vessel. The liability of the vessel under this subsection shall not be based upon the warranty to seaworthiness or a breach thereof at the time the injury occurred. The remedy provided in this subsection shall be exclusive of all other remedies against the vessel except remedies available under this chapter.

Emphasis added.

The only change in 1972 in the first paragraph was to place "(a)" in front of the existing Section 905 and substitute "the chapter" for "this chapter." Subsection (b) was a new creation.

At the onset of review one is struck by two things. The first is: Section

905(a) does not mention indemnity agreements at all, but Section 905(b) does.

The second point of first impression as to these statutes is that Section 905(b) voids indemnity agreements only insofar as they would benefit a "vessel." There is no vessel involved in this case.

This is all the further the Court really needs to go. At this point, it is perfectly obvious that neither section has any application to the particular facts of this case.

A. United States Supreme Court Decisions

In this review, it is important to keep in mind that Seattle/Crescent's claim is that the Longshoremen and Harbor Worker's Compensation Act, as amended in 1972, bars enforcement of a written contract of indemnity not just between a stevedore employer and a vessel, as the statute provides, but between a stevedore employer

and anyone, as the statute does not provide. It was Seattle/Crescent's argument to the Court of Appeals that although Congress used the term "vessel" in Section 905(b), it did not mean just a "vessel" as defined in Section 902(21), it meant everything in the world.

In P.C. Pfeiffer Co. v. Ford, ___ U.S. ___, 100 S. Ct. 328 (1979), the Court set forth the "primary purposes of the 1972 Amendments."

> The primary purposes of the 1972 Amendments were to raise the amount of compensation available under the Act, to abolish longshoremen's seaworthiness remedy against the owners of a vessel, and to outlaw shipowners' claims for indemnification from stevedores.

100 S. Ct. at 332, n. 3.

The Court did not state that the primary purpose was to outlaw all claims for indemnification from stevedores. The only claims for which indemnification were outlawed were those by "shipowners." A not

too surprising statement in light of the plain, unambiguous language of the statute.

Edmonds v. Compagnie Generale Transatlantique, ___ U.S. ___, 99 S. Ct. 2753 (1979), was the third case in which the Court reviewed the 1972 Amendments. The entire opinion is taken up with a careful review of the legislative history of the 1972 Amendments.

In Edmonds, the Court had to interpret the first two sentences of Section 905(b). The United States Court of Appeals for the Fourth Circuit had determined that the 1972 Amendments had altered the traditional admiralty rule by making the shipowner liable only for that share of the total damages equivalent to the ratio of its fault to the total fault. The Court was "unpersuaded that Congress intended to upset a long-established and familiar principle of maritime law by imposing a proportionate fault rule."

In Edmonds, the Court set forth the authoritative review of the situation before the 1972 Amendments (99 S. Ct. at 2757):

> We first held that the shipowner could not circumvent the exclusive remedy provision by obtaining contribution from the concurrent tort-feasor employer. Halcyon Lines v. Haenn Ship Ceiling & Refitting Corp., 342 U.S. 282, 72 S. Ct. 277, 96 L. Ed. 318 (1952); Pope & Talbot, Inc. v. Hawn, supra; see Cooper Stevedoring Co. v. Fritz Kopke, Inc., 417 U.S. 106, 111-113, 94 S. Ct. 2174, 2177-2178, 40 L. Ed. 2d 694 (1974). As a matter of maritime law, we also held that a longshoreman working on a vessel was entitled to the warranty of seaworthiness, Seas Shipping Co. v. Sieracki, 328 U.S. 85, 94, 66 S. Ct. 872, 877, 90 L. Ed. 1099 (1946), which amounted to liability without fault for most onboard injuries. However, we went on to hold, as a matter of contract law, that the shipowner could obtain from the stevedore an express or implied warranty of workmanlike service that might result in indemnification of the shipowner for its liability to the longshoreman. Ryan Stevedoring Co. v. Pan-Atlantic S.S. Corp., 350 U.S. 124, 76 S. Ct. 232, 100 L. Ed. 133 (1956).
>
> Against this background, Congress acted in 1972, among other things,

> to eliminate the shipowner's liability to the longshoreman for unseaworthiness and the stevedore's liability to the shipowner for unworkmanlike service resulting in injury to the longshoreman--in other words, to overrule Sieracki and Ryan. See, Northeast Marine Terminal Co. v. Caputo, 432 U.S. 239, 260-261, and n. 18, 97 S. Ct. 2348, 2355-2356, and n. 18, 53 L. Ed. 2d 320 (1977); Cooper Stevedoring Co. v. Fritz Kopke, Inc., supra, 417 U.S., at 133 n. 6, 94 S. Ct. at 2178 n. 6. Though admitting that nothing in either the statute or its history expressly indicates that Congress intended to modify as well the existing rules governing the longshoreman's maritime negligence suit against the shipowner by diminishing damages recoverable from the latter on the basis of the proportionate fault of the nonparty stevedore, 577 F.2d at 1155, and n. 2, the en banc Court of Appeals found that such a result was necessary to reconcile two sentences added in 1972 as part of § 905(b) of the Act.

Emphasis added.

The Court did not see anything in the preamendment history or in the amendments themselves which indicated that either the Court or the Congress was interested in anything other than the normal tripartite

situation: Longshoreman; Stevedore; Shipowner.

Again, emphasizing that it is to the normal tripartite arrangement of longshoremen, stevedores and vessels that the Congress was speaking, the Court looked to the first sentence of Section 905(b) (99 S. Ct. at 2758):

> The first sentence addresses the recurring situation, reflected by the facts in this case, where the party injured by the negligence of the vessel is a longshoreman employed by a stevedoring concern. In these circumstances, the longshoreman may sue the vessel as a third party, but his employer, the stevedore is not to be liable directly or indirectly for any damages that may be recovered. This first sentence overrules Ryan and prevents the vessel from recouping from the stevedore any of the damages that the longshoreman may recover from the vessel. But the sentence neither expressly nor implicitly purports to overrule or modify the traditional rule that the longshoreman may recover the total amount of his damages from the vessel if the latter's negligence is a contributing cause of his injury, even if the stevedore, whose limited liability is fixed by statute, is partly to blame.

As is apparent in the view of the Court, the amendments did certain specific things but they did not totally rewrite the law even as to vessels which are expressly mentioned. How much less then is the strength of the assertion that the amendments rewrote the law as to non-vessels which are not even mentioned in the amendments.

Turning to the legislative history relative to Section 905(b), the Court did point out (99 S. Ct. at 2760, n. 18):

> The debate over Section 905(b) involved the removal of the shipowner's liability for unseaworthiness. That occurred as a concomitant of ending liability under the stevedore's warranty of workmanlike service, which was a quid pro quo for increasing the compensation benefits.

Again, one is struck by the total lack of any reference no matter how oblique, that the situation with which Congress was concerned involved anyone other than the familiar arrangement of longshoreman,

stevedore and vessel. The simple fact of the matter is that there is no reference to longshoremen, stevedore and non-vessel because Congress was not considering that situation. Nowhere in the legislative material submitted by Seattle/Crescent is there any indication that Congress had any intention of making so fundamental a change in the law as voiding written contracts of indemnity running in favor of non-vessels. There is simply no basis by which one can imply such a change in law because there is no indication that the Congress ever considered the longshoreman, stevedore and non-vessel relationship.

The second case in which the Supreme Court looked at the 1972 Amendments was Director, Office of Workers Compensation Programs v. Rasmussen, 440 U.S. 29, 99 S. Ct. 903, 59 L. Ed. 2d 122 (1979). The case decides whether death benefits payable under the Act are subject to the maximum

limit expressly placed on disability payments by the Act. At first blush the case would appear to have nothing to do with our problem. But as sometimes occurs, that first impression is misleading. What the petitioner was asking the Court to do was to rule that the maximum limitation on disability benefits found in Section 906(b)(1) should be incorporated into the death benefit provisions of Section 909. The Court asked the "obvious question," why did not Congress, if such was their intent, put a ceiling on death benefits in the section on death benefits? The petitioner's answer was that while the death benefits section would be the most obvious place to put in a maximum on death benefits, "Congress merely overlooked this fact." The Court characterized the petitioner's argument as being that when Congress amended the section on death

benefits, it forgot to stipulate maximum on death benefits, but

> that Congress remembered the question of death benefit maximums while considering [disability benefits] and rather than incorporate a death benefit ceiling in the section of the Act dealing with death benefits, Congress consciously decided to limit death benefits in the section dealing with disability compensation.

The Court said (99 S. Ct. at 908): "One need only to state Petitioner's argument to recognize its flaws."

The flawed argument of the petitioner and that of Seattle/Crescent are not dissimilar. Here Seattle/Crescent argues that when Congress enacted Section 905(b) in 1972 and used the term "vessel" some nine times, it meant "vessel" to mean vessel and non-vessel. We ask the "obvious question," why did not Congress expressly refer to vessel and non-vessel if such was its intent?

Applying some basic set theory analysis to Seattle/Crescent's claim, its unreasonable nature becomes evident. The word "vessel" describes a certain group or set, i.e., those things which have the characteristics of a "vessel." The word "non-vessel" describes a group or set made up of everything in the world except those things included within the set "vessel." Putting the two sets together, we have a new set which includes everything in the world. It is Seattle/Crescent's position that the Congress of the United States, while expressly referring only to those things contained within the set "vessel" meant to include everything in the world! To state the position is to expose its inherent flaw of unreasonableness.

In Rasmussen, the Court closed its opinion thus (99 S. Ct. at 913):

> Petitioners entreat us to interpret the 1972 Amendments to avoid an

> absurd and discriminatory consequence.
>
> . . . .
>
> Congress has put down its pen, and we can neither rewrite Congress' words nor call it back to cancel half a line. Our task is to interpret what Congress has said. . . .

What Congress said was "vessel"; what Congress did not say was "non-vessel." Congress has put down its pen and the Court should not pick it up to add additional words.

The first case in which the Court reviewed the 1972 Amendments was Northeast Marine Terminal Co. v. Caputo, 432 U.S. 249, 97 S. Ct. 2348, 53 L. Ed. 2d 320 (1977). The narrow issue was whether the amendments which extended coverage inland extended it so as to cover individuals working on containerized cargo. The Court held them covered.

In the opinion the Court made two statements which are of assistance in our search. In reviewing the Act in general,

the Court characterized it as "a typical workmen's compensation system, compensating an employee for injuries arising out of and in the course of employment." 432 U.S. at 258.

However, of even more impact is the Court's statement of the factors which led to the 1972 Amendments.

> The main concern of the 1972 Amendments was not with the scope of coverage but with accommodating the desires of three interested groups: (1) shipowners who were discontented with the decisions allowing many maritime workers to use the doctrine of seaworthiness to recover full damages from shipowners regardless of fault; (2) employers of the longshoremen who, under another judicially created doctrine, could be required to indemnify shipowners and thereby lose the benefit of the intended exclusivity of the compensation remedy; and (3) workers who wanted to improve the benefits schedule deemed inadequate by all parties.

As noted before, the tripartite group with which the Congress was concerned consisted of longshoremen, stevedores and shipowners. The simple fact of the matter

is that non-shipowners, non-vessels, like the Port of Seattle, were not among those "three interested groups" whose diverse desires Congress sought to accommodate.

From these four United States Supreme Court cases we may extract some guidance:

(1) The Longshoremen and Harbor Workers Compensation Act is a typical workmen's compensation system. Northwest Marine Terminal, supra, 432 U.S. at 258.

(2) The main concern of the 1972 Amendments was with accommodating the desires of longshoremen, stevedores and shipowners. Northwest Marine Terminal, supra, 432 U.S. at 261.

(3) The argument that Congress "forgot" to state exactly what it meant is unpersuasive; after Congress has put its pen down, the Court will not pick it up to add words. Director v. Rasmussen, supra, 99 S. Ct. at 913.

(4) The 1972 Amendments eliminated the shipowners' liability to the longshoremen for unseaworthiness and the stevedores' liability to the shipowners for unworkmanlike service. Edmonds, supra, 99 S. Ct. at 2757.

(5) The first sentence of Section 905(b) is addressed to the recurring situation involving longshoremen, stevedores and vessels. Edmonds, supra, 99 S. Ct. at 2758.

(6) The primary purposes of the 1972 Amendments were to raise the amount of compensation, to abolish a longshoreman's seaworthiness remedy against a vessel and to outlaw a vessel's claim for indemnification from a stevedore. Pfeiffer, supra, 100 S. Ct. at 332 n. 3.

B. United States Court of Appeals

The leading case which discussed our situation was written by Judge Friendly of

the Second Circuit: Zapico v. Bucyrus-Erie Co., 579 F.2d 714 (2d Cir. 1978). The case involved a non-vessel seeking contribution from a stevedore without benefit of a written contract of indemnity. The District Court had allowed the non-vessel to recover 50%. The Court of Appeals reversed, holding a stevedore can be held liable for indemnity to a non-vessel only if there is an express contract of indemnity. As noted earlier, there is a written contract of indemnity between Seattle/Crescent and the Port.

Judge Friendly set out a thorough and perceptive analysis of the legal and factual background which led to the 1972 Amendments. Starting with Section 905(a), "Exclusiveness of Liability," Judge Friendly noted that the law was that this section meant that indemnity was prohibited unless based on contract.

However, it was under the express prohibition of indemnity language in Section 905(b) that the stevedore (i.e., ACL) sought relief. Judge Friendly concluded that, because the claimant (Bucyrus) was a non-vessel, Section 905(b) had no application (579 F.2d at 721):

> ACL argues that the italicized phrase [in Section 905(b)] was meant not only to reverse Ryan on its own facts but to prevent recovery on any indemnity theory, whether express or implied, by any third party plaintiff against a compensation-paying employer. However, the statute explicitly cuts off indemnity only to a "vessel," which was defined by the 1972 Amendments as follows:
>
> > The term "vessel" means any vessel upon which . . . any person entitled to benefits under this chapter suffers injury or death . . . and said vessel's owner, owner pro hac vice, agent, operator, charter or bare boat charterer, master, officer or crew member.
>
> 33 U.S.C. § 902(21). The general definitional statute, 1 U.S.C. § 3, states:
>
> > The word "vessel" includes every description of watercraft or other artificial contrivance used, or capable of being used, as a means of transportation on water.

Under these definitions, Bucyrus clearly is not a vessel. The legislative history likewise is of no assistance to ACL. It does indicate that § 905(b) was meant to prevent Ryan indemnity actions by vessels, but does not mention suits by non-vessels one way or the other. See, H.R.Rep. No. 1441 92d Cong., 2d Sess. (1972) reproduced in 3 U.S. Code Cong. & Admin. News pp. 4698, 4701-05 (1972). Neither does ACL necessarily have the better of the legislative policy argument. There is no assurance, as the stevedore claims, that if Congress has considered non-vessels it would have them cut off as well in order to make compensation payments the sole liability of the employer and to stop triangular suits once and for all. The shipowners got a quid pro quo for the loss of their indemnity rights. Prior to the 1972 Amendments they were liable to injured longshoremen not only for the ship's own negligence but also on a strict liability theory (the "unseaworthiness" doctrine) for conditions which often were actually credited by the stevedore. See Seas Shipping Co. v. Sieracki, 328 U.S. 85, 66 S. Ct. 872, 90 L. Ed. 1099 (1946); DeGioia v. United States Lines Co., 304 F.2d 421, 425-26 (2d Cir. 1962); Footnote 2, supra. The 1972 Amendments eliminated the unseaworthiness theory and limited vessel liability to negligence in exchange for the surrender of the vessel's indemnity rights. See, H.R.Rep. No. 1441, supra, 3 U.S. Code Cong. & Admin.

> News at 4701-05 (1972); Munoz v. Flota Merchante Grancolumbiana, S.A., 553 F.2d 937, 840 (2d Cir. 1977). No such quid pro quo was offered to non-vessels. Given the clear statutory language and the absence of legislative history at variance with it, we would hesitate to hold that § 905(b) by its own force cuts off the availability of Ryan indemnity to a non-vessel in all cases where the concurring negligence of a stevedoring company has caused injuries to the latter's employees, see generally, Gould v. General Mills, Inc., supra, 441 F. Supp. at 1183; Crutchfield v. Atlas, supra, 403 F. Supp. 920; Brkaric v. Star Iron, supra, 409 F. Supp. at 520, for example, although we do not intend these to be exclusive, where there is a direct contractual relationship between the third party and the stevedore or where the third party is designated as a beneficiary of an express contract between the stevedore and a vessel.
>
> However, even if so much should be accepted, Bucyrus still has the heavy burden of finding an implied agreement by the stevedore to indemnify it. As we have already indicated, only contract-based indemnity could overcome the "on account of" language of § 905(a). Here there was no express contract of indemnity between Bucyrus and ACL.

Emphasis added.

The holdings of the case are clear:

(1) Section 905(b) has no application to non-vessels.

(2) Section 905(a) bars indemnity unless there is a written contract of indemnity between the indemnitor and the indemnitee.

C. Federal District Courts

There have been a number of cases in the United States District Courts which have reviewed the 1972 Amendments. These cases generally hold that Section 905(b) does not apply to non-vessels and Section 905(a) will bar indemnity except when there is an express contract of indemnity.

In Crutchfield v. Atlas Offshore Boat Service, Inc., 403 F. Supp. 920 (E.D. La. 1975), a longshoreman was injured while loading pipe onto a vessel. The longshoreman sued the vessel and Gulf Oil, for whom the work was being done. Gulf Oil sued the longshoreman's employer, the stevedore, on an indemnity clause in the contract between

Gulf and the stevedore. The stevedore moved for dismissal on the basis of Section 905(b). The court denied the motion pointing out that Section 905(b) applied to a vessel, not to a non-vessel (403 F. Supp. 921):.

> The 1972 Amendments proscribed indemnity agreements between the employer of the injured worker and the vessel. There is no indication in the statute or the legislative history that Congress intended to invalidate all indemnity agreements between the employer and others.

Court's emphasis.

Similar discussion and conclusions are found in the other District Court opinions: Nieves v. Douglas Steamship, Ltd., 451 F. Supp. 407 (S.D.N.Y. 1978); Cargill v. U.S.A., 1977 A.M.C. 50 (E.D. Va. 1976); Brkaric v. Star Iron Steel Co., 409 F. Supp. 516 (E.D.N.Y. 1976); Gould v. General Mills, Inc., 411 F. Supp. 1181 (W.D.N.Y. 1976); Zapico v. Bucyrus-Erie Co., 434 F. Supp. 567 (S.D.N.Y. 1977), reversed on

other grounds, 579 F.2d 714; Travis v. International Multifood Corp., 464 F. Supp. 503 (W.D.N.Y. 1978); Fitzgerald v. Compania Naviera La Molinera, 394 F. Supp. 402 (E.D. La. 1974).

III. None of Petitioner's Cases Involved a Written Contract of Indemnity

In the trial court Seattle/Crescent had one District Court case upon which it relied: Spandola v. Viking Yacht Co., 441 F. Supp. 798 (S.D.N.Y. 1977).

In its Motion for Reconsideration to the Washington Court of Appeals, Seattle/Crescent cited a California Court of Appeals decision: IT Corp. v. Superior Corp., 83 Cal. App. 3d 443, 147 Cal. Rptr. 828 (1978).

In its Petition for Review to the Washington Supreme Court, Seattle/Crescent added another District Court opinion: Kane v. Firestone Steel Products Co., 463 F. Supp. 473 (E.D. Pa. 1978).

These three cases have one very important similar characteristic which distinguishes them from this case: none of them involve a written contract of indemnity.

We must note that while Petitioner Seattle/Crescent spends two pages quoting from the IT Corp. opinion, nowhere does it quote the key holding of that court:

> Accordingly, we conclude that: (1) absent an express or implied contract of indemnity, the employer of a person injured in circumstances covered by the LHWCA has no liability to indemnify a third person sued by the employee for the same injury; and (2) the employer has established as a matter of law that there is not an express contract of indemnity and that no covenant to indemnify can be implied from the contractual arrangement between the general contractor who seeks indemnity and the subcontractor-employer from whom it is sought.

In the instant case there is an express written contract of indemnity by which Seattle/Crescent agreed to indemnify the Port of Seattle.

In Spandola there was no express written contract of indemnity and the trial court refused to infer one.

In Kane, there was no express written contract of indemnity and the trial court refused to infer one.

All three cases relied upon by Seattle/Crescent are consistent with Judge Friendly's conclusion in Zapico.

Seattle/Crescent cites not one single case which holds that a written contract of indemnity between a stevedore and a non-vessel is unenforceable. There is no split of authority. There is no difference of opinion. The Washington Court of Appeals decision was consistent with every single case which has considered the effect of the 1972 Amendments.

CONCLUSION

The 1972 Amendments cut off all right of a vessel to seek indemnity from a stevedore. They had no affect on the right of a non-vessel to seek enforcement of a written contract of indemnity with a stevedore.

There exists no split of authority in this country on the enforceability of a written contract of indemnity by a non-vessel. The Petition should be denied.

DATED September ___, 1981.

Respectfully submitted,

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Petitioner's Reply Brief

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IN THE

Supreme Court of the United States

OCTOBER TERM 1981

SEATTLE CRESCENT CONTAINER SERVICE,
Petitioner,

v.

PORT OF SEATTLE,
Respondent.

BRIEF IN REPLY TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF WASHINGTON

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ARGUMENT

I. The Judgment Sought To Be Reviewed Is "Final" As That Term Has Been Construed By This Court

Respondent Port of Seattle urges in its Brief in Opposition that no final judgment exists in this case and therefore this Court is without jurisdiction to grant a petition for a writ of certiorari to review the judgment. Petitioner Seattle

Crescent Container Service ("Seattle Crescent") disagrees. The Port of Seattle cites two cases decided by this Court in support of its position. One of these cases was decided in 1923 and the other in 1952. As the Court is well aware, the requirement of finality is an important one but is also one which has been considered by the Court (especially in more recent years) in a pragmatic rather than a hyper-technical sense.

The Court made clear in its opinion in Cox Broadcasting Corp. v. Cohn, 420 U.S. 469, 95 S. Ct. 1029, 43 L. Ed. 2d 328 (1975), that there are at least four categories of cases in which jurisdiction for review by the Court exists when the highest court of a state has finally determined the federal issue present in a particular case but in which there are further proceedings to come in the lower

state courts. Cox Broadcasting Corp. v. Cohn, supra, 420 U.S. at 477.

The Cox Broadcasting opinion described the first category of such cases as follows:

> In the first category are those cases in which there are further proceedings -- even entire trials -- yet to occur in the state courts but where for one reason or another the federal issue is conclusive or the outcome of further proceedings preordained.

420 U.S. at 479.

Seattle Crescent submits that this is such a case. In the trial court Seattle Crescent obtained a summary judgment of dismissal of the Port's complaint on two grounds: (1) that Section 905 of the LHWCA voids an express contract of indemnity between a stevedore and a non-vessel third party, and (2) that the Port of Seattle's complaint failed to state a claim upon which relief could be granted.

The court of appeals reversed the trial court's judgment on both grounds. If the case is remanded and Seattle Crescent loses at a trial on the merits it cannot raise either of these issues again in the State appellate courts. Thus, without review by this Court the only way in which Seattle Crescent could prevail would be to win on the facts of the case in state trial court. This no longer appears possible.

As the court of appeals stated in its opinion (set out at page C-15 of the Petition for Writ of Certiorari) the Port's complaint alleged that plaintiff Gibson's injuries were not caused by the Port's negligent or intentional acts or by the Port's failure to perform contractual obligations. The indemnity agreement quoted by the Port at pp. 1-2 of its Brief in Opposition provides that the Port is entitled to indemnity from Seattle Crescent

in cases such as this unless the Port failed to provide equipment in good order or it was solely negligent in causing an injury to one of Seattle Crescent's employees. As noted by the Port at page 2 of its Brief in Opposition, a separate action was brought by the Port of Seattle against Seattle Crescent for damage to the straddle carrier operated by Gibson. That case proceeded to trial and the jury determined that Seattle Crescent was negligent and solely responsible for the accident and further that the Port was not negligent. The Port has already indicated that if this case is remanded to the trial court it will move for summary judgment on the grounds that the factual issues in the case have already been determined in the companion case in which both of the parties involved with this petition, Seattle Crescent and the Port, were represented and actually litigated all of the factual issues to be

resolved in this case. Although Seattle Crescent has thus far refused to admit that it will ultimately be found liable to the Port on account of the factual determinations in the companion case, the law of collateral estoppel in the State of Washington makes that result nearly inevitable.[1/]

[1/] In the Port of Seattle's reply brief in the Court of Appeals of the State of Washington at page 16, the Port stated:

> The elements of collateral estoppel were set forth in Lucas v. Velikanje, 2 Wn. App. 888, 471 P.2d 103 (1970):
>
> > Before the doctrine of collateral estoppel can be applied, affirmative answers must be given to the following questions: (1) was the issue decided in a prior adjudication identical with the one presented in the action in question? (2) Was there a final judgment on the merits? (3) Was the party against whom the plea is asserted a party or in privity with a party to the prior adjudication? (4) Will the application of the doctrine not work an injustice on the party to whom the doctrine is to be applied?

As pointed out in Seattle Crescent's petition, so long as doubt exists as to the validity of contracts of indemnity such as the one at issue here no stevedore employer can adequately assess the potential liability exposure arising out of lawsuits against non-vessel third parties brought by longshoremen injured while in a stevedore's employ. Because the federal issue

---

(Footnote 1 continued)

> If the jury verdict in the property damage case is affirmed, then all of these questions can be answered in the affirmative and there will be no reason for further litigation. The facts as found by the jury when taken together with the language of the indemnity agreement between the Port and Seattle Crescent permit one conclusion: the Port is entitled to a judgment of indemnity.

The jury verdict in the property damage case was in fact affirmed by the Court of Appeals in an unpublished opinion filed on February 9, 1981, entitled Crescent Wharf and Warehouse Co., Inc. and Seattle Stevedore Co. d/b/a Crescent Container Service [sic] v. Clarklift of Washington, Inc.; Clark Equipment Company and Port of Seattle.

involved in this case is an important one and is as a practical matter the only remaining defense Seattle Crescent has to the Port of Seattle's claim (because any state court litigation on the merits of the Port's claim against Seattle Crescent is preordained by virtue of the jury decision in the companion case), Seattle Crescent urges this Court in light of its prior decisions to determine that the court of appeals' decision is a final one for purposes of this Court's jurisdiction and to agree to review it.

II. The 1972 Amendments To the LHWCA Do Affect a Written Contract of Indemnity Between a Stevedore and a Non-Vessel

The Port's principal contention in its Brief in Opposition is that the 1972 Amendments to the LHWCA do not affect a written contract of indemnity between a stevedore and a non-vessel. It stresses that Seattle Crescent has cited no case to

the contrary, but neither has the Port cited any cases directly in support of its proposition. Rather, the Port cites cases which deal with situations where no express written contract of indemnity existed. Indeed, in the decision principally relied upon by the Port of Seattle, Zapico v. Bucyrus-Erie Co., 579 F.2d 714 (2d Cir. 1978), quoted at pp. 25-27 of the Port's Brief in Opposition, the Zapico court states: "Here there was no express contract of indemnity between Bucyrus and ACL." Thus, Judge Friendly's Zapico opinion is a general discussion of his interpretation of the effect of the 1972 Amendments and with respect to the issue for review is only dictum. In its petition Seattle Crescent has referred to the opinions of other courts with respect to the proper interpretation of the effect of the 1972 Amendments and even if these are

dicta they are obviously in direct contradiction to the views stated by Judge Friendly.

One court has carefully considered the prior decisions of this Court, the legislative history of the 1972 Amendments designed to promote on the job safety as well as the public policy in favor of treating vessels and non-vessels alike and has determined that Section 905 of the LHWCA does bar express contracts of indemnity such as the one at issue here: that court was the trial court below. The Washington Court of Appeals, relying in part on an analogy to the Washington Industrial Insurance Act, reversed. Seattle Crescent submits that that decision was in error and has contributed to the confusion surrounding the issue for review. The real question here is the effect of the 1972 Amendments on this Court's decision in Ryan Stevedoring Co. v. Pan Atlantic

S.S. Corp., 350 U.S. 124, 76 S. Ct. 232, 100 L. Ed. 2d 133 (1956), and only this Court can answer that question definitively.

CONCLUSION

For the reasons set forth above Seattle Crescent Container Service respectfully urges this Court to grant its petition.

Respectfully submitted,

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